STATE OF MICHIGAN

COURT OF APPEALS

CONRAD P. BECKER, JR.,

Plaintiff-Appellee,

v

BENJAMIN THOMPSON and TRUDENCE S. THOMPSON,

Defendants-Appellants.

UNPUBLISHED
May 23, 2006

No. 262214
Mackinac Circuit Court
LC No. 02-005517-CH

Before: Sawyer, P.J., and Kelly and Davis, JJ.

PER CURIAM.

In this equitable action, defendants appeal by leave granted. They challenge an order of the circuit court granting plaintiff title by adverse possession to certain property and two prescriptive easements over portions of defendant's property. We affirm in part, reverse in part and remand.

Defendants first argue that the circuit court erred in granting plaintiff title by adverse possession to approximately 1500 square feet of land surrounding an existing well utilized by plaintiff. We disagree. An action seeking to quiet title through a claim of adverse possession is equitable in nature. *Gorte v Dep't of Transportation*, 202 Mich App 161, 165; 507 NW2d 797 (1993). In equitable actions, we review a trial court's findings of fact for clear error and its conclusions of law de novo. *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 117; 662 NW2d 387 (2003); MCR 2.613(C). A factual finding is clearly erroneous where we are "left with a definite and firm conviction that a mistake has been made." *Reed v Reed*, 265 Mich App 131, 150; 693 NW2d 825 (2005).

MCL 600.5801 provides in relevant part:

> No person may bring or maintain any action for the recovery or possession of any lands or make any entry upon any lands unless, after the claim or right to make the entry first accrued to himself or to someone through whom he claims, he commences the action or makes the entry within the periods of time prescribed by this section.

The statutory period for disseisin through adverse possession is fifteen years. MCL 600.5801(4); *Wengel v Wengel*, 270 Mich App 86; __ NW2d __ (Docket No. 263657, issued February 28, 2006), slip op at 4.

> "A claim of adverse possession requires clear and cogent proof that possession has been actual, visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period of fifteen years. . . . A cause of action does not accrue until the property owner of record has been disseised of the land. Disseisin occurs when the true owner is deprived of possession or displaced by someone exercising the powers and privileges of ownership." . . .
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> [A]dditionally, . . . the possession must be hostile and under cover of a claim of right. "The term 'hostile' as employed in the law of adverse possession is a term of art and does not imply ill will[;]" rather, hostile use is that which is "inconsistent with the right of the owner, without permission asked or given," and which use "would entitle the owner to a cause of action against the intruder." [*Id.* (citations omitted).]

The evidence presented below supported the circuit court's conclusion that plaintiff adversely possessed property surrounding the well at issue. The placement of the well was clearly actual and visible; plaintiff presented photographic evidence of its existence, an overflow tank and a "fish pond." It was fully open to observation, as surveys conducted disclosed its existence. Its existence was notorious as the testimony of various individuals established. Indeed, defendants were aware of its existence. Plaintiff's use was exclusive. He testified that the well was used by himself, his family and his guests; nothing in the record suggests that defendants used the well. The use was continuous and uninterrupted. Plaintiff testified that the well was sunk approximately fifty-five years previously and that his use of it continued unabated until approximately 2001. This testimony was corroborated by additional testimony concerning the well's long-term existence and its use as a "live well". The use existed for the statutory fifteen-year period. This was established by both plaintiff's and defendants' testimony. Plaintiff's use of the well was hostile. No evidence suggested that plaintiff enjoyed permission from defendants, or their predecessors in interest, to sink the well. Indeed, testimony indicated that defendants' predecessor in interest believed that plaintiff had sunk the well on *his own* property. Defendants and their predecessors in interest were entitled to bring a claim against plaintiff for trespassing; they did not. See *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 681; 619 NW2d 725 (2000), quoting 1 Restatement Property, Servitudes, 3d, § 2.16, comment f, pp 228-233 (discussing hostile use as use creating a cause of action such as trespass for interference with a property interest). Finally, plaintiff possessed the well under a claim of right. He testified that he was present during its construction, that the well serviced his family cabin and garden, that he made improvements on the well, including the installation of an overflow tank and "fish pond," and that he utilized the well and improvements for 25 years. He indicated generally that he treated the property at issue as his own. The circuit court therefore

did not clearly err, *Higgins Lake, supra* at 117, in concluding that these circumstances entitled plaintiff to title of the well by adverse possession.[1]

Defendants argue that the circuit court made erroneous factual findings supporting its conclusion that plaintiff adversely possessed the well. They argue that the court failed to consider the timing of plaintiff's suit. However, they attempted to introduce such evidence before the circuit court, which ruled it inadmissible, finding it irrelevant. "[T]he decision whether to admit or exclude evidence is reviewed for an abuse of discretion." *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005). MRE 402 precludes the admission of irrelevant evidence. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. The court did not abuse its discretion in denying defendants' request to proffer evidence concerning plaintiff's motives in pursuing the instant litigation. *Elezovic, supra* at 419. Why plaintiff pursued the instant claim simply has no bearing on whether plaintiff satisfied the elements of this claim.

Defendants further argue that the court's factual findings were erroneous because the court failed to consider alleged inconsistencies in plaintiff's testimony. Defendants fail to present record evidence supporting their position, however. Further, the circuit court concluded that plaintiff was a credible witness. We "give deference to the trial court's superior ability to judge the credibility of the witnesses who appeared before it." *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 652; 662 NW2d 424 (2003), quoting *Rellinger v Bremmeyr*, 180 Mich App 661, 665; 448 NW2d 49 (1989). Because the record discloses no reason to doubt the truth of plaintiff's testimony, the court's reliance on it was justified.

Defendants next argue that the circuit court erred in granting plaintiff a prescriptive easement over property designated as a "two-track." We disagree. An action seeking an easement by prescription is equitable in nature. See *Higgins Lake, supra* at 117. Again, in such actions, we review a court's findings of fact for clear error and its legal conclusions de novo. *Id.*

"An easement represents the right to use another's land for a specified purpose." *Plymouth Canton Community Crier, Inc, supra* at 678. "An easement by prescription results from use of another's property that is open, notorious, adverse and continuous for a period of fifteen years." *Id.* A prescriptive easement is distinguished from acquisition of title by adverse possession in that no requirement of exclusivity exists. *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1994). Plaintiff has the burden

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[1] Defendant cites *Du Mez v Dykstra*, 257 Mich 449; 241 NW 182 (1932), for the proposition that "in the case of vacant and unenclosed lands, the claimant must by word or act give notice to the owner of a claim of right before he or she may obtain title by prescription." While this is accurate, it is irrelevant. Defendants were placed on notice of plaintiff's claim of right by his installation of a well on the property, as opposed to the defendant's mere use of an existing road in *Du Mez*. Likewise, defendants' predecessor in interest was on notice of plaintiff's claim of right to the property at issue: he believed it to be plaintiff's property altogether.

of establishing entitlement to a prescriptive easement by clear and cogent proof. *Killips v Mannisto*, 244 Mich App 256, 260; 624 NW2d 224 (2001).

The evidence presented supports the trial court's conclusion that plaintiff acquired a prescriptive easement over the two-track. Plaintiff's use of the two-track was open and notorious. Culverts were installed, and trees and debris were cleared from the path. The path was openly visible to independent investigation and, according to testimony proffered, its use was obvious. Indeed, this is confirmed by photographic evidence in the record. Plaintiff's use of the two-track was continuous for the statutory period. He testified that the two-track was built approximately fifty-five years previously and used consistently thereafter.[2] This use was confirmed by independent testimony that the two-track was used for seasonal hunting and felling lumber, and that it was maintained. See *Dyer v Thurston*, 32 Mich App 341, 344; 188 NW2d 633 (1971) (noting that "continuous use does not mean constant use" and seasonal use may be sufficient to establish an easement by prescription).

Defendants argue that plaintiff's use of the two-track was not hostile because, as its placement was on undeveloped, wooded land, permissive use is presumed. " '[H]ostile' merely means use that is inconsistent with the rights of an owner." *Killips, supra* at 259. Testimony established that defendant's predecessor in interest was fully aware of plaintiff's use of the property, believing that the property was plaintiff's and that plaintiff held it under a claim of right. This establishes hostility. *Killips, supra* at 259-260.

Finally, defendants argue that the circuit court erred in granting plaintiff a prescriptive easement over property designated as a "river access path." We agree. In *Du Mez v Dykstra*, 257 Mich 449, 451; 241 NW 182 (1932), our Supreme Court observed that

> [o]ne may acquire a right of way by prescription over wild and uninclosed lands. But, while use alone may give notice of adverse claim of inclosed premises, the weight of authority is that it raises no presumption of hostility in the use of wild lands. This distinction is in recognition of the general custom of owners of wild lands to permit the public to pass over them without hindrance. . . . The tacit permission to use wild lands is a kindly act which the law does not penalize by permitting a beneficiary of the act to acquire a right in the other's land by way of legal presumption, but it requires that he bring home to the owner, by word or act, notice of a claim of right before he may obtain title by prescription.

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[2] Defendants argue that there was sufficient evidence from which the court could conclude that the two-track was part of an existing network of trails. This evidence consisted of area maps, admitted into evidence, which defendant Trudence Thompson testified purport to illustrate that the two-track was in fact an existing logging road created prior to plaintiff's acquisition of the property. Nevertheless, the circuit court found plaintiff's testimony that he built the two-track credible. This conclusion, as a reasonable choice between competing testimony, is entitled to deference. See *Glen Lake Ass'n, supra* at 531.

Given *Du Mez*, plaintiff failed to demonstrate that his use of the river access path was hostile to defendants' interest. The record indicates that defendants' predecessor in interest was aware of plaintiff's claim of right to property encompassing plaintiff's two-track. But it further indicates that he believed he owned certain, undefined property between the north-south parallel running along the two-track's easternmost point and the river to which the river access path leads. This is insufficient to demonstrate that defendants' predecessor in interest was aware of plaintiff's claim of right to the *entire* river access path. Further, defendants testified that they were unaware that plaintiff was claiming a right to their property, until this litigation began. Plaintiff's actions otherwise did not constitute hostility, but mere personal and recreational use, such as that contemplated in *Du Mez*.[3] Plaintiff failed to demonstrate that his actions were hostile to defendants' interest. Plaintiff therefore failed to establish, *by clear and cogent proof,* that he was entitled to a prescriptive easement over the river access path. *Killips, supra* at 260.

Affirmed in part, reversed in part, and remanded for entry of an order consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Kirsten Frank Kelly
/s/ Alton T. Davis

[3] While plaintiff's installation of a gate, precluding entrance to both his and defendants' property entirely, may have otherwise been sufficient to establish the requisite hostility, it occurred in approximately 1993 and thus does not satisfy the statutory period for a prescriptive easement. *Higgins Lake, supra* at 118.